

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 13, 2007 Session

MICHAEL L. STENBERG
v.
HICKMAN COUNTY, TENNESSEE

An Appeal from the Circuit Court for Hickman County
No. 04-5018C Jeffery S. Bivens, Judge

No. M2007-00433-COA-R3-CV - Filed December 17, 2007

This is a negligence case based on actions of county law enforcement officers. After a night of drinking heavily, the plaintiff pointed a gun at his wife and threatened to kill her or himself. The wife called 9-1-1, and two county law enforcement officers were dispatched to the plaintiff's trailer home. Upon the officers' arrival, the plaintiff retreated to his bedroom and refused to surrender his gun. Eventually, the plaintiff agreed to allow the officers to enter his bedroom, and placed the gun near the bed within his reach. In an effort to get the plaintiff under control and away from the gun, the officers made a plan to have one officer spray the plaintiff with pepper spray, with the other officer ready to shoot the plaintiff if he tried to grab his gun. As planned, the first officer sprayed the plaintiff with pepper spray. The plaintiff then lunged in the direction of his gun, and the second officer fired his gun, striking the first officer in the hand and the plaintiff under his arm. The plaintiff filed this lawsuit against the defendant county, alleging that the officers acted unreasonably under the circumstances and arguing that they could have apprehended him without using lethal force. After a bench trial, the trial court held in favor of the county. The plaintiff now appeals. We affirm, finding that the preponderance of the evidence supports the trial court's finding that the officers acted reasonably under the circumstances.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, J., and DAVID R. FARMER, J., joined.

Phillip L. Davidson, Nashville, Tennessee, for the appellant, Michael L. Stenberg.

Thomas C. Corts, Nashville, Tennessee, for the appellee, Hickman County.

OPINION

This is the story of a Valentine's night gone badly awry. Plaintiff/Appellant Michael L. Stenberg ("Mr. Stenberg") and his wife Brandi Stenberg ("Mrs. Stenberg") lived in a single-wide trailer home in Hickman County, Tennessee. The night of February 14, 2003, Mr. Stenberg and some friends had been drinking alcohol together at the Stenbergs' mobile home. The drinking carried on all night. Mr. Stenberg's friends spent the night at his home and left in the morning.

When Stenberg awoke the next day, still intoxicated, he began arguing with Mrs. Stenberg. At some point, Mr. Stenberg pointed a loaded gun at her; he threatened to shoot her and also to shoot himself. Mrs. Stenberg called 9-1-1 and reached dispatcher Scott Rushton ("Rushton"). She informed Rushton that her husband was drunk, had a gun, and had threatened her.¹

¹The following is an excerpt from the 9-1-1 call placed from the Stenberg home:

Mrs. Stenberg: Hello. My husband has been up all night drinking with a bunch of friends. He has been pushing me, shoving me around and trying to keep the stereo turned up all the way.

* * *

Dispatcher: And what is his name?

Mrs. Stenberg: Michael Stenberg.

* * *

Mrs. Stenberg: They had brought over a great big old bottle of E&J [Brandy] last night.

Dispatcher: Where are you located?

Mrs. Stenberg: [to Mr. Stenberg in background] Leave me alone, Mike. Don't touch me.

Mr. Stenberg: [in background] Oh, yeah. Who unplugged my phone? You've been whipping my ass all night.

Mrs. Stenberg: Nobody's hit you, Michael. How could I have been whipping your ass? You're the one that was up drinking all night. Not me.

* * *

Mr. Stenberg: [in background] You won't f___ing let me talk.

Mrs. Stenberg: [to Dispatcher] He is still seriously drunk.

Dispatcher: Has he been hitting on you?

Mrs. Stenberg: He tried.

* * *

Mrs. Stenberg: He needs to quit drinking is what he needs to do.

Dispatcher: Has he left any marks on you, mam?

Mrs. Stenberg: Huh?

Dispatcher: Any physical marks?

Mrs. Stenberg: I don't know, but now he's got the nine millimeter [gun].

Mr. Stenberg: [yelling in background] I'm fixing to shoot her.

Mrs. Stenberg: Now he said he's going to shoot me.

Dispatcher: Let me talk to him.

Mr. Stenberg: Hello.

Dispatcher: Hi.

Mr. Stenberg: Hey. What's going on?

(continued...)

In response to this call, Rushton dispatched Hickman County Deputy Sheriff Kenneth Lynn (“Deputy Lynn”) and Constable Barry Cayce (“Constable Cayce”) to the Stenbergs’ home. By the time the officers arrived, Mr. Stenberg had retreated to a bedroom with the door closed. The officers told Mrs. Stenberg to stay away from the room.

For twenty minutes or more, the officers talked to Mr. Stenberg from outside the bedroom, trying to convince him to give them his gun. In response to the officers’ shouted requests, Mr. Stenberg said repeatedly, “F__k. you. You’re not getting the gun.”

Deputy Lynn asked Constable Cayce to go outside to determine whether he could see inside the bedroom. Constable Cayce, however, could not see inside the bedroom window from outside the trailer. While Constable Cayce was outside, Deputy Lynn went into the bedroom with Mr. Stenberg. After more conversation, Mr. Stenberg finally put his gun down, placing it on the stereo stand next to the bed on top of some video tapes. When he came inside, Constable Cayce joined Deputy Lynn in the bedroom with Mr. Stenberg. The officers continued to talk to Mr. Stenberg, who

¹(...continued)

Dispatcher: Not much. What’s up.

* * *

Mr. Stenberg: I’m sitting in my room just minding my own damn business.

Dispatcher: Uh huh.

Mr. Stenberg: She won’t leave me alone.

* * *

Mr. Stenberg: Now, she’s the one that f___ing being a pain in the ass. She won’t f___ing leave me alone.

Dispatcher: Wow. Okay.

Mr. Stenberg: I don’t know what the f__k she told you, but she won’t leave me alone.

Mrs. Stenberg: [in background] If you’d quit scrapping and pushing on me -

Mr. Stenberg: [in background again] If you’d just f___ing leave me alone, I wouldn’t have nothing to do with you. [Continuing to yell in background: “I ain’t done s__t.”]

Mrs. Stenberg: [back on telephone to Dispatcher] Hello. [To Mr. Stenberg] Then quit coming out and pushing on me. [to Dispatcher] Hello?

Dispatcher: I’m right here.

Mrs. Stenberg: He’s pointing that nine at me again. He’s got that nine millimeter pointed straight at me now. Now he’s got it at his head.

* * *

Dispatcher: Has he gone in his room?

Mrs. Stenberg: He’s in there now.

* * *

Mrs. Stenberg: Twelve years of being together and I’m tired of it. We’ve only got four more payments left on this land and we’ve got this place paid off and every time he drinks, especially hard liquor -

Dispatcher: Right.

was sitting on the bed. Deputy Lynn and Constable Cayce holstered their weapons, and Mr. Stenberg's gun remained on the stereo.

While Deputy Lynn and Constable Cayce were talking to Mr. Stenberg, Dispatcher Rushton called. Talking to Deputy Lynn, he indicated to Deputy Lynn that he would talk to Mr. Stenberg on the telephone in order to distract him so that the officers could spray Mr. Stenberg with pepper spray to subdue him and get him under control. Deputy Lynn gave the telephone to Mr. Stenberg, who began talking to Rushton. While Mr. Stenberg was talking to Rushton, Deputy Lynn whispered to Constable Cayce that he was going to spray Mr. Stenberg with pepper spray. He instructed Constable Cayce that "if [Mr. Stenberg] went for his gun to shoot him."

In accordance with their plan, Deputy Lynn sprayed Mr. Stenberg with pepper spray. Mr. Stenberg was stunned for a couple of seconds, and then he tossed the telephone down on the bed and reached in the direction of the stereo cabinet. Believing that Mr. Stenberg was grabbing for his gun, Constable Cayce fired his own gun. The bullet first hit Deputy Lynn in the hand and then hit Mr. Stenberg under the armpit. After that, Mr. Stenberg was handcuffed and both he and Deputy Lynn were transported for treatment of their wounds.

Following the incident, Mr. Stenberg's gun was found on the floor behind the stereo cabinet. Mr. Stenberg underwent emergency surgery for his wounds at Vanderbilt Medical Center. Deputy Lynn was treated at a medical facility in Columbia, Tennessee, and was released. Mr. Stenberg was later indicted for aggravated assault.

On February 15, 2003, Mr. Stenberg filed a lawsuit against Hickman County ("the County") for the allegedly negligent conduct of Deputy Lynn and Constable Cayce, acting in the scope of their employment as Hickman County officers.² Mr. Stenberg alleged that Deputy Lynn was negligent "in that he failed to properly secure [Mr.] Stenberg in a manner that would not have caused him to be shot," and that ordering Constable Cayce "to shoot [Mr.] Stenberg violated his duty to use only force necessary to secure [Mr.] Stenberg." He further asserted that Constable Cayce was negligent in using excessive force to apprehend Mr. Stenberg when "[Mr.] Stenberg could not get to his weapon and was not a danger to anyone." Hickman County filed an answer, admitting that Deputy Lynn was an employee of the County and that Constable Cayce was operating under its direction and control.³ It denied, however, that either of the officers were negligent.

On August 2, 2006, the trial court conducted a bench trial in the matter. The trial court heard testimony from Mr. Stenberg, Mrs. Stenberg, Deputy Lynn, Constable Cayce, and Dispatcher Rushton. As to the events leading to the shooting, the testimony of the witnesses was substantially consistent. The testimony related to the actual shooting was less consistent.

²Mr. Stenberg amended his complaint to allege a civil rights violation pursuant to 42 U.S.C. § 1983, but that claim was voluntarily dismissed.

³The parties stipulated that, if there was negligence on the part of Constable Cayce and/or Deputy Lynn, that the County was vicariously liable for that conduct.

Mrs. Stenberg testified first. She said that, when her husband was shot, she was in the living room of their trailer home on a telephone extension listening to Mr. Stenberg's conversation with Dispatcher Rushton. She indicated that she heard Rushton tell Deputy Lynn that he planned to ask Mr. Stenberg to turn down the stereo as part of the routine to distract him. Mrs. Stenberg said that she then heard Dispatcher Rushton ask Mr. Stenberg to turn the stereo down, and that Mr. Stenberg responded, "Sure, I will turn it down." Just after that, she heard the bed creak, as if there had been movement. She then heard the shot. She did not see the events in the bedroom.

Mr. Stenberg testified next. He said that, when Deputy Lynn and Constable Cayce came into his bedroom, his gun was inside the stereo cabinet, behind some video tapes, behind a closed glass stereo cabinet door, out of plain sight. When the officers asked Mr. Stenberg for his gun, he told them he did not want to touch it because he "was afraid that I would be shot if I grabbed my weapon." Mr. Stenberg said that, when Dispatcher Rushton called, he attempted to coax Mr. Stenberg into giving the officers his gun. Mr. Stenberg refused Rushton's request because he did not want to touch the gun. Mr. Stenberg said that Rushton then asked him to turn down the stereo because he could not hear him very well. In his testimony, Mr. Stenberg acknowledged that the stereo "wasn't even that loud." At that point, Mr. Stenberg said he "got up and went to lean over to turn [the stereo] down." He said he told Deputy Lynn and Constable Cayce that Dispatcher Rushton wanted him to turn the stereo down. According to Mr. Stenberg, Constable Cayce exclaimed, "He's going for it" and shot him. Mr. Stenberg claimed that he was standing up when he was shot. He recalled that Deputy Lynn stuck out his hand as if to stop Constable Cayce from raising his weapon, but it was too late. Mr. Stenberg did not recall being sprayed with pepper spray, did not recall threatening the officers, and in fact did not remember anything else that happened until he awoke in the hospital. Mr. Stenberg adamantly maintained that he did not reach for his gun before he was shot; he said that the only reason he moved in the direction of the stereo was to turn the stereo down.

Constable Cayce was then called to testify.⁴ When he and Deputy Lynn arrived, Mr. Stenberg was in the bedroom with his weapon. They both approached with their weapons drawn. Deputy Lynn shouted at Mr. Stenberg repeatedly to slide his gun out into the hallway. Mr. Stenberg's consistent response was "F-U, you are not getting the gun." Deputy Lynn asked Constable Cayce to go outside to see if he could see inside the bedroom window to determine the location of Mr. Stenberg and his weapon. When Constable Cayce did so, he could not see in the window because there was a black flag with a skull and cross bones hanging over the window. When Constable Cayce re-entered the trailer, Deputy Lynn was inside the bedroom with Mr. Stenberg. Deputy Lynn had his weapon drawn by his side, and Mr. Stenberg's gun was clearly visible on the stereo on top of the VCR tapes. Both Deputy Lynn and Constable Cayce spent several minutes talking to Mr. Stenberg, trying to get him to give them his gun. They even holstered their weapons at one point in order to gain his trust, all to no avail. Dispatcher Rushton then called; after Deputy Lynn spoke with him briefly, he handed the telephone to Mr. Stenberg to speak with

⁴Constable Cayce testified that a Constable is an elected official. He did not attend basic training at the law enforcement training academy; he did 40 hours of in-service training, including firearms training. As a Constable, he rode frequently with Hickman County deputies. Constable Cayce said that some counties no longer utilize Constables.

Rushton. Constable Cayce testified that Deputy Lynn whispered to him that he was about to spray Mr. Stenberg with pepper spray, and that “[i]f he goes for the weapon, shoot him.” Deputy Lynn then sprayed Mr. Stenberg. Mr. Stenberg “sat there for a couple of seconds and then kind of tossed the phone down and reached for the weapon.” At that point, believing that Mr. Stenberg was reaching for his gun and fearing for his safety, Constable Cayce fired his gun, striking Deputy Lynn’s hand first and then hitting Mr. Stenberg. When Mr. Stenberg reached for the gun, Constable Cayce testified, he knocked the VCR tapes over and the gun was pushed behind the stereo cabinet. Constable Cayce said that, at the time he was shot, Mr. Stenberg was sitting on the bed.

Deputy Lynn also testified. He said that, when he arrived, Mr. Stenberg was in the bedroom with the door closed. Deputy Lynn “hollered” at him several times to throw the gun out in the hallway. Mr. Stenberg “holler[ed] out F-U, I am not putting the gun out.” Finally, Deputy Lynn entered Mr. Stenberg’s bedroom; Mr. Stenberg was holding his weapon. He convinced Mr. Stenberg to put the gun down, and Mr. Stenberg placed it on top of the video tapes on the stereo cabinet, in plain view.⁵ During this time, Deputy Lynn said, the stereo was not playing.

Deputy Lynn said that the officers spent several fruitless minutes trying to get Mr. Stenberg to give the officers his weapon; Mr. Stenberg refused and remained less than an arm’s length from his weapon. Finally, Dispatcher Rushton called. Rushton suggested that he talk to Mr. Stenberg on the telephone, to distract him long enough for the officers to pepper spray him and “get control of him.” Deputy Lynn handed the telephone to Mr. Stenberg. He acknowledged that he told Constable Cayce that he intended to spray Mr. Stenberg with pepper spray, and that Constable Cayce was to shoot Mr. Stenberg if he went for his gun. When Deputy Lynn sprayed Mr. Stenberg, Mr. Stenberg “paused for maybe a second. Then he kind of let out a scream and a yell. And then he lunged forward and leaned over toward – to grab the pistol.” Deputy Lynn then heard the gunshot and realized that he had been shot through the hand, and that Mr. Stenberg had been shot as well.

Deputy Lynn was asked why he did not just grab Mr. Stenberg’s arm when he handed him the telephone, in order to get control of him and avoid spraying him with pepper spray and shooting him. Deputy Lynn explained that Mr. Stenberg “was too close to the pistol and if I didn’t grab him just right, he would maybe break free, and then he was in arm’s length of that pistol.” Deputy Lynn considered this to be a dangerous situation because Mr. Stenberg was drunk and he had a weapon either in his hand or within his reach. Deputy Lynn, like Constable Cayce, maintained that there was no doubt in his mind that, at the time he was shot, Mr. Stenberg was reaching for his gun.

Dispatcher Rushton testified about his perspective of the incident. During his testimony, a tape recording of the 9-1-1 calls was played for the trial court, and a transcript of that recording was entered into evidence. Rushton acknowledged that there were several different telephone calls between him and those in the Stenberg home, but only one continuing transcript existed, and certain parts of the conversations were not included in the transcript. Rushton could not explain why some

⁵Deputy Lynn acknowledged that, in a statement he gave to the Tennessee Bureau of Investigation, he said that Stenberg was unarmed when he entered the bedroom and that the gun was in “arm’s reach.” At trial, he recanted that statement, and insisted that Mr. Stenberg was holding the gun when he entered the bedroom.

portions were missing. He testified that he did not recall hearing music or asking Mr. Stenberg to turn down the stereo before he was shot. This concluded the proof at trial, and the trial court took the matter under advisement.

On December 27, 2006, the trial court issued its findings of fact and conclusions of law. The trial court found Deputy Lynn and Constable Cayce to be generally credible. It found specifically that, on the day in question, Mr. Stenberg was intoxicated, that he refused to obey the officers' orders to surrender his loaded gun, and that the gun was eventually placed on the stereo cabinet within Mr. Stenberg's reach. It also found that Deputy Lynn had instructed Constable Cayce to shoot Mr. Stenberg if he moved toward his weapon. When Deputy Lynn moved toward Mr. Stenberg in order to subdue him with pepper spray, Mr. Stenberg moved toward his gun. The trial court found that Constable Cayce fired his gun because he felt that Mr. Stenberg was placing him and Deputy Lynn in immediate threat of bodily injury. In contrast, the trial court found that Mr. Stenberg's testimony was not credible and noted that it was "missing in many details." The trial court found particularly questionable Mr. Stenberg's claim that he had placed the gun in the closed stereo cabinet, when he admitted that, in order to close the glass door of the cabinet, his mattress needed to be moved. Based on its findings of fact, the trial court concluded that Deputy Lynn and Constable Cayce acted reasonably under the circumstances, and it dismissed Stenberg's claims of negligence.⁶ On January 30, 2007, the trial court entered a final order dismissing the case, incorporating by reference its oral ruling. From this order, Mr. Stenberg now appeals.

On appeal, Mr. Stenberg argues that the evidence preponderates against the trial court's finding that Deputy Lynn and Constable Cayce acted reasonably. Because this case was heard by the trial court without a jury, we must review the findings of fact *de novo*, presuming those findings to be correct, unless the preponderance of the evidence is otherwise. *Varner v. Perryman*, 969 S.W.2d 410, 411 (Tenn. Ct. App. 1997); Tenn. R. App. P. 13(d). Conclusions of law are to be reviewed *de novo*, with no presumption of correctness. *See State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997); Tenn. R. App. P. 13(d).

Mr. Stenberg argues that a preponderance of the evidence shows that Deputy Lynn acted unreasonably, in that he had more reasonable means of apprehending him other than giving an order for Constable Cayce to shoot him.⁷ Mr. Stenberg contends that Deputy Lynn and Constable Cayce had two options other than shooting him. First, they could have apprehended Mr. Stenberg when Deputy Lynn reached over to hand him the telephone to speak to Dispatcher Rushton. Mr. Stenberg argues that both Deputy Lynn and Constable Cayce were within an arm's length of him, and that

⁶The trial court criticized the County's practice of having untrained constables serve as back up for actual officers in the sheriff's department, but noted that this case did not focus on the lack of training issue.

⁷Mr. Stenberg cites Tennessee Code Annotated § 40-7-108, which states that a law enforcement officer "may use deadly force to effect an arrest, only after all other means of apprehension have been exhausted or are unavailable" T.C.A. § 40-7-108 (2006). He also cites Tennessee Code Annotated § 39-11-611(a) (2006), which states that force against another person is justified only if the person reasonably believes that such force is necessary. T.C.A. § 39-11-611(a) (2006). Mr. Stenberg's complaint, however, is based on a common law negligence, and not on a statutory violation.

they “should have been able to handle an inebriated man with little problem.” Second, the officers could have apprehended Mr. Stenberg when he was sprayed with pepper spray. Deputy Lynn and Constable Cayce both testified that Mr. Stenberg paused for a couple of seconds after he was sprayed, and they could have apprehended him at that time. Mr. Stenberg claims that the evidence shows that the officers did not actually believe that he was a threat, noting that the officers’ guns were holstered while they were all in the bedroom. Therefore, he argues that the evidence preponderates against the trial court’s conclusion that Deputy Lynn and Constable Cayce acted reasonably under the circumstances.

As is typical in negligence cases, the trial court’s decision in this case was based in large part on its assessment of the witnesses’ credibility. When factual findings are based on witness credibility, we give considerable deference to the trial court’s determinations, because the trial court had the opportunity to observe the witnesses and assess their demeanor. The appellate court will not overturn such credibility determinations absent clear and convincing evidence to the contrary. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

Here, it is undisputed that, when Deputy Lynn and Constable Cayce arrived at the Stenbergs’ trailer, Mr. Stenberg was heavily intoxicated and had repeatedly threatened to kill his wife and himself. Despite over twenty minutes of coaxing, Mr. Stenberg steadfastly refused to surrender his gun to these officers. The officers testified that Mr. Stenberg kept his gun either in his hand or within his reach at all times. In the face of Mr. Stenberg’s complete failure to cooperate, it was reasonable for the officers to surmise that force would be required to apprehend Mr. Stenberg, and that the force used would have to be sufficient to prevent Mr. Stenberg from reacquiring his gun. Deputy Lynn testified that he did not attempt to simply grab Mr. Stenberg, as suggested by Mr. Stenberg’s counsel, because Mr. Stenberg was “within arm’s reach of the pistol. All he had to do was one good jerk, and he would have his hand on the pistol.” Deputy Lynn and Constable Cayce both testified that, at the time Mr. Stenberg was shot, they were certain that he was lunging for his gun. Both were in fear for their safety. There is no clear and convincing evidence to refute the trial court’s decision to credit the officers’ testimony. Under all of these circumstances, giving due deference to the trial court’s credibility determinations, we find that the preponderance of the evidence supports the trial court’s determination that Deputy Lynn and Constable Cayce acted reasonably under the circumstances. Therefore, we find in favor of the County and affirm the trial court’s decision to dismiss Mr. Stenberg’s case.

The decision of the trial court is affirmed. Costs on appeal are to be taxed to Appellant Michael L. Stenberg and his surety, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE